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MATERIALS ON PROPERTY

Part I

D. Mendes da Costa
Faculty of Law
University of Toronto

Richard J. Balfour
Osgoode Hall Law School
York University

1981-82
PRE-PUBLICATION EDITION

Faculty of Law
University of Toronto
Toronto, Ontario

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PREFACE

These materials are prepared for teaching purposes only. They are provided only for the purpose of discussion in class. They are to be used for no other purpose. The aim of these materials is to introduce the student to some general principles relating to the Law of Real and Personal Property. Volume I deals with some aspects of the Law of Personal Property. Volumes 2 to 5 are concerned with some aspects of the Law of Real Property and also with Leaseholds.

This material does not purport to be comprehensive or exhaustive. Further, it is compiled on the assumption that other topics, including, for example, land use planning, land finance, land development, real estate transactions, community planning, environmental control, and expropriation are dealt with later in the curriculum. These topics are not included within the scope of this Casebook.

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PERSONAL PROPERTY

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CHAPTER I

THE IDEA OF PROPERTY

Section 1 Introduction

When presented with a novel question of property ownership, how should a court make its decision? Is the court's primary concern to arrive at a just disposition of the actual dispute, or to formulate a sensible principle capable of general application? What should guide the court — precedent on related points? The views of legal scholars? Common sense?

TUCKER *v.* FARM AND GENERAL INVESTMENT TRUST LTD.

[1966] 2 QB 421 (CA)

LORD DENNING M.R. In August, 1963, Mervin James Perry, who was a farmer at Hockworthy, near Wellington, Somerset, acquired a number of ewes, 84 Kerry Hill cross ewes, on hire-purchase. The finance company was the Farm & General Investment Trust Ltd., the defendants. Mr. Perry paid £120 down. The total hire-purchase price was £647. It is significant that having made the initial payment of £120, there were only two instalments payable many months later. The first instalment was payable 10 months thereafter on June 20, 1964, the sum of £263 10s. The next one on August 28, 1964, of another sum of £263 10s. The reason, no doubt, was to give time for the ewes to have lambs. Then, as is usual under a hire-purchase agreement, at the end of the hiring, if the hirer had paid those instalments, by paying an extra £1 as the option to purchase, he could buy the ewes. It is quite a simple straightforward hire-purchase agreement for livestock.

In September Perry had those ewes served. They had their lambs at the end of February and the beginning of March. Then on April 2, Perry, apparently being in financial difficulties, sold the ewes and the lambs—I think 75 ewes and 83 lambs—to the plaintiff, also a farmer. Mr. Perry had no right whatever to sell the ewes as they were the property of the defendants. But the plaintiff did not know this. He bought the ewes and lambs in good faith. He had not got room for the ewes and lambs on his farm, so he asked Perry to keep them for a bit. Mr. Perry a week later sold them again. He had no right to do so. He sold them to one Punchard, who took them off. But Punchard soon found that there was something wrong about the deal and he called it off. He stopped his cheque. The defendants got to know about it. The defendants on April 22 said: "These ewes and lambs are ours," and they took possession of the ewes and lambs. So the plaintiff, who, as I have said, on April 2 had bought the ewes and lambs and paid for them, found himself without any. He had to admit that the ewes belonged to the defendants, but he said that the lambs were his. He said they belonged to Perry at the time when Perry sold them to him; and Perry had a right to sell the lambs and so the lambs were his.

The county court judge did not accede the plaintiff's claim. He said there was a principle of English law that when a person owns livestock, the progeny always belongs to the owner. The property in the young of domestic animals is the owner of the mother. It says so in Halsbury's Laws of England, 3rd ed., Vol. 1 (1952), p. 656. The judge said that, as in this case the defendants were the owners of the ewes when the lambs were born, they were the owners of the lambs too and were the owners of them on April 2 and indeed all the time. There was no implication in the contract, said the judge, that they should belong to Perry.

NOTES AND QUESTIONS

1. What is the general rule with respect to ownership of the offspring of animals? What justification for it can you find? Would another rule be superior?

2. What does the Tucker case find to be an exception to the general rule? Is it a sensible one?

3. In Wickahoney Sheep Co. v. Sewell, 273 F. 2d 767 (United States Court of Appeals, Ninth Circuit, 1959), two of the plaintiffs, the Sewells, sold 4087 sheep to the defendant, Wickahoney, for $121,700, under a contract which called for a $15,000 downpayment and payments of $15,000 each succeeding year until the full price, plus interest, was paid. The contract entitled the seller, upon default of the buyer unremedied for ninety days, to reclaim the property and retain all payments previously made. The buyer made the downpayment but defaulted on the first annual payment. At trial, the plaintiffs were awarded damages equal to the value of the sheep and the lambs produced while the defendant had the sheep. On appeal, that judgment was affirmed. Is Wickahoney consistent with the principal case?

4. In West v. Ankney, 134 NE 2d 185 (Court of Common Pleas of Ohio, 1956), the plaintiff was employed to manage the farm leased by the defendant under a contract which provided for an equal division of the tenant's share of the "net farm income". When a dispute arose over the amount owed to the plaintiff, one of the issues presented to the Court was whether the natural increase in livestock, which was owned by the defendant and the lessor of the farm, should be taken into account in determining "net farm income". The Court held that it should not, adopting the statement that: "In the absence of any agreement to the contrary, the offspring or increase of tame and domestic animals belongs to the owner of the dam or mother, and it

appears that the rule is applicable to tamed or reclaimed wild animals" (p. 191). Is West consistent with the principal case?

PROBLEM

In 1978, John, without the knowledge or consent of Tom, entered Tom's land and drove away part of a flock of sheep belonging to Tom. In 1979, some of the ewwes gave birth to lambs. In 1980, Tom for the first time discovered his loss. To whom do the lambs belong? Advise John and Tom.

Section 2 The Meaning of Property

What is "property"? It is obvious that a book, or a car, or a piece of land can be property. But what about intangible rights — an invention or a debt? Does an individual have a proprietary interest in his ideas? His right to privacy? Of the infinite number of such questions, only a few need be posed to demonstrate that in many cases it will not be clear whether something is or is not property.

The cases and notes in this and succeeding Sections are an introduction to the often elusive concept of property. It may be impossible to arrive at a comprehensive definition, but you should be able to derive some general sense of things. As you read this material, try to identify the basic characteristics of property, and consider the significance, in each case, of the conclusion that a given interest is or is not property.

NOTES AND QUESTIONS

1. In Victoria Park Racing and Recreation Grounds Company Limited v. Taylor, (1937), 58 CLR 479 (HC), reports of horse races at the plaintiff's track were broadcast without authorization by a radio station. To restrain this practice, the plaintiff sought injunctions against the participants in the scheme, including the defendant Taylor, who owned land across the street from the park and who permitted an employee of the station to describe the races from an observation platform at the top of a scaffold on his land. The plaintiff failed at trial and on appeal.

In the High Court, Latham C.J. said: "I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence" (p. 494). The Chief Justice also considered and rejected the plaintiff's argument that it had a quasi-property right in the spectacle of the horse race:

> I find difficulty in attaching any precise meaning to the phrase "property in a spectacle." A "spectacle" cannot be "owned" in any ordinary sense of that word. Even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense. Any appropriateness in the metaphor would depend upon the existence of the legal principle. The principle cannot itself be based upon such a metaphor [p. 496-97].

Dixon J. also discussed the plaintiff's property argument:

> The fact is that the substance of the plaintiff's complaint goes to interference, not with its enjoyment of the land, but with the profitable conduct of its business. If English law had followed the course of development that has recently taken place in the United States, the "broadcasting rights" in respect of the races might have been protected as part of the quasi-property created by the enterprise, organization and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. . . .

> In dissenting from a judgment of the Supreme Court of the United States by which the organized collection of news by a news service was held to give it in equity a quasi-property protected against appropriation by rival news agencies, *Brandeis* J. gave reasons which substantially represent the English view and he supported his opinion by a citation of much English authority (*International News Service* v. *Associated Press*). His judgment appears to me to contain an adequate answer both upon principle and authority to the suggestion that the defendants are misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value. Briefly, the answer is that it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches. [p. 508-09].

2. International News Service (INS) was followed in an American case, Pittsburg Athletic Co. v. KQV Broadcasting Co, 24 F. Supp. 490 (US District Court, Pennsylvania, 1938), similar on the facts to Victoria Park. The plaintiff, owner of the Pittsburg Pirates baseball team, obtained a preliminary injunction to restrain unauthorized play-by-play broadcasting of Pirate games by the defendant; the commentary was broadcast by observers stationed outside the baseball park at vantage points leased by the defendant. Schoonmaker J. distinguished Victoria Park on the basis that English law did not recognize a doctrine of unfair competition.

Victoria Park has been followed by an Australian court in a situation similar to that in INS. In John Fairfax and Sons Pty. Ltd. v. Australian Consolidated Press Ltd. [1960] SR (NSW) 413 (Supreme Court of New South Wales), in which the defendants' newspaper reproduced the birth and death columns of the plaintiffs' newspaper, the Court stated that an ex parte injunction which restrained the defendants' copying of the columns "could be granted only on the basis of infringement of copyright, for a newspaper can have no exclusive right to the dissemination of items of news or events published by it [citing Victoria Park]" (p. 414).

3. English and Commonwealth courts have recognized a limited right of protection against unfair competition in the form of the tort of passing off. The quintessential act of passing off is false marketing — selling goods in a way which is likely to misrepresent them to purchasers as the product of another — but today subtler forms of capitalizing on the goodwill of a competitor are recognized as tortious. In a recent leading case, Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd., [1979] AC 731 (HL), the defendant, by marketing from 1974 an egg and wine drink as "Keeling's Old English Advocaat," had passed off his product as that of the plaintiff, the leading producer of Dutch advocaat, a popular and similar tasting egg and spirit drink sold in England for more than 50 years. The advocaat case has been followed in Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd. (1980), 29 OR 2d 221 (HC).

For another leading case in which a passing off action based on similar packaging and advertising failed, see Cadbury Schweppes Pty. Ltd. v. Pub Squash Co. Pty. Ltd., [1981] 1 All ER 213 (PC). Speaking for the Board, Lord Scarman said, however, that the tort of passing off could be based on use of a competitor's advertising where the plaintiff has proved that "he has built up an 'intangible property right' in the advertised descriptions of his product, or, in other words, that he has succeeded by such methods in giving his product a distinctive character accepted by the market" (p. 218). In Pub Squash, Lord Scarman also considered whether, as Cadbury had argued in an earlier stage of the litigation, the law of Australia had developed the broader tort of unfair competition; after quoting from INS, however, Lord Scarman declined to decide the point because it had not been pursued before the Privy Council.

4. In Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Ex. Ch. 382, the plaintiff entered into an agreement with the Montreal Alouettes under which the plaintiff was given the exclusive right to telecast the home and away games of the football club. Canadian Admiral then contracted with the Canadian Broadcasting Corporation to have the latter televise the games in the Montreal area. Four live home games and four taped away games were broadcast by the CBC in that year. On each occasion the defendant, a cablevision company, intercepted the broadcasts and distributed them to its subscribers. In an action based upon infringement of copyright, Cameron, J. referring to Section 3 of the Copyright Act, made the following statement: "It follows, therefore, that no matter how 'piratical' the taking by one person of the work of another may be, such taking cannot be an infringment of the rights of the latter unless copyright exists in the work under the provisions of s. 3" (p. 390). In the result, it was held that the plaintiffs did own the copyright to the taped games which were broadcast, but that it did not have, and could not have, similar rights in respect to the live telecasts.

Is Canadian Admiral more consistent with INS or Victoria Park?

For a case similar to Canadian Admiral, see Warner Bros. — Seven Arts Inc. v. CESM-TV Ltd. (1971) 65 CPR 215 (Ex. Ct.) summarized on page 1.3.9.

5. In Capital Cities Communications Inc. v. Canadian Radio-Television Commission (1978), 81 DLR (3d) 609 (SCC), the Supreme Court was asked to decide the question of whether there existed property rights in television signals. Laskin, C.J.C., speaking for the majority, did not deal with the issue because it was being litigated directly in other proceedings. Pigeon, J., for the minority, however, stated that a licensed broadcaster has an exclusive franchise in his allotted channel.

6. Is it possible to have a property right in an idea?

This question, considered in the principal case, was an issue raised in Desny v. Wilder, 299 P. 2d 257 (Supreme Court of California, 1956), in which the plaintiff alleged that a plot synopsis he had prepared had been used by the director Billy Wilder in the Paramount Pictures production, "Ace in the Hole." The plaintiff alleged that the defendants had contracted to pay him if they used his work, and claimed $150,000 in damages. At trial, summary judgment was ordered for the defendant; on appeal, that judgment was reversed in part and remanded for further proceedings.

Schauer J., for the Supreme Court, discussed the plaintiff's property rights as follows (pp. 265-66):

> An idea is usually not regarded as property, because all sentient beings may conceive and evolve ideas throughout the gamut of their powers of cerebration and because our concept of property implies something which may be owned and possessed to the exclusion of all other persons. ...

[He then quoted from Mr. Justice Brandeis in INS on the question, and continued:]

> ... it is clear that California does not now accord individual property type protection to abstract ideas. (Weitzenkorn v. Lesser (1953), 40 Cal. 2d 778, 788-789, 256 P. 2d 947.) This accords with the general weight of authority. (See generally, Nimmer, "The Law of Ideas" (1954) 27 So. Cal. L. Rev. 120 et seq. and cases cited.) "There may be literary property in a particular combination of ideas [and this must presuppose an expression thereof] or in the form in which ideas are embodied. There can be none in the ideas." (Fendler v. Morosco (1930), 253 NY 281, 287, 171 NE 56, 58.) Neither common law nor statutory copyright extends protection to an idea as such. "[O]nly in the 'expression' of a copyrighted work does any monopoly inhere: the 'theme,' the 'plot,' the 'ideas' may always be freely borrowed." (Dellar v. Samuel Goldwyn, Inc. (2 Cir., 1945), 150 F. 2d 612.) ...

Schauer J. went on to say, however, that an idea could be the subject of a contract. Since the plaintiff may have submitted his synopsis pursuant to a contract, express or implied, which obligated the defendant to pay for it, the Court held that the plaintiff's pleadings presented triable issues of fact which precluded the granting of summary judgment to the defendant.

For related cases, see Van Rensselaer v. General Motors Corporation 223 F. Supp. 323 (1962, United States District Court, Michigan); Donahue v. Ziv Television Programs, Inc. 54 Cal. Rptr. 130 (1966, District Court of Appeal of California); David Robbins v. Frank Cooper Associates 252 NYS 2d 318 (1964, Court of Appeals of New York).

Ideas may also be protected against misappropriation, even in the absence of a contract, when they are confidential: Equity will grant an injunction against unauthorized use of confidential information communicated in circumstances implying an obligation of confidence. See e.g., Talbot v. General Television Pty. Ltd., [1980] VR 224 (Vict. SC) (idea for television series suggested to network protected against unauthorized use by network). For a general discussion of breach of confidence, see Snell's Principles of Equity (27th ed., 1973, R.E. Megarry and P.V. Baker) 650-2.

7. In the spirit of INS, American courts have often granted protection against unfair competition to those whose products and ideas have fallen prey to the unfair trading practices of others. See, for example: Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp. 101 NYS 2d 483 (NY Supreme Court, 1950); Capitol Records, Inc. v. Mercury Records Corporation 221 F. 2d 657 (US Court of Appeals, Second Circuit, 1955); Chemical Corporation of America v. Anheuser-Busch, Inc. 306 F. 2d 433 (US Court of Appeals, Fifth Circuit, 1962); certiorari denied 372 US 965 (1963); Pottstown Daily News Publishing Company v. Pottstown Broadcasting Company 411 Pa. 383, 192 A. 2d 657 (Pennyslvania Supreme Court, 1963); and Gant of New Haven, Inc. v. Chez Boye Parfums International, Inc. 256 F. Supp. 982 (US District Court, MD Florida, 1966).

In Sears, Roebuck & Co. v. Stiffel Company, 376 US 225, 84 S. Ct. 784 (1964) and Compco Corp. v. Day-Brite Lighting, Inc. 376 US 234, 84 S. Ct. 779 (1964), the U.S. Supreme Court held that state unfair competition law could not prohibit copying of an unpatented article, because federal patent legislation pre-empted state initiatives

in the area. In both cases, the Court stated that the same theory applied to state protection of uncopyrighted work. Sears and Compco thus appeared to cut back significantly on the scope of unfair competition law, and some courts so interpreted them: see Columbia Broadcasting System, Inc. v. De Costa, 377 F. 2d 315 (US Court of Apeals, First Circuit, 1967), and Press Publishing Company v. Atlantic County Advertiser, Inc., 283 A. 2d 103 (NJ SC, 1971). Other courts, distinguishing Sears and Compco as precluding only prohibition of unauthorized "copying", continued to grant protection against unfair competition when it involved "misappropriation": see Capitol Records, Inc. v. Greatest Records, Inc. 252 NYS 2d 553 (NY SC, 1964), and Capitol Records, Inc. v. Erickson, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (California Court of Appeal, 1970).

Since 1973, however, the Supreme Court has sharply limited the Sears-Compco doctrine (without overruling the cases) and has upheld state unfair competition laws. In Goldstein v. California, 412 US 546, 93 S. Ct. 2303 (1973), the Court sustained state copyright legislation protecting recordings not eligible for federal copyrights, and in Kewanee Oil Corp. v. Bicron Corp., 416 US 470, 94 S. Ct. 1879 (1974), it upheld the validity of state trade secret common law, finding that it had not been pre-empted by federal patent legislation. See also Aronson v. Quick-Point Pencil Company, 99 S. Ct. 1098 (US SC, 1979). The Supreme Court's recent lead has been followed in Columbia Broadcasting System, Inc. v. Melody Recordings, Inc., 341 A. 2d 348 (NJ Superior Court, Appellate Division, 1975); A & M Records, Inc. CBS et al v. MVC Distributing Corporation, 574 F. 2d 312 (US Court of Appeals, Sixth Circuit, 1978); and Morseburg v. Balyon, 621 F. 2d 972 (US Court of Appeals, Ninth Circuit, 1980). But see A.A. Hoehling v. Universal City Studios, Inc., 618 F. 2d 972 (US Court of Appeals, Second Circuit, 1980) and Ives Laboratories, Inc. v. Darby Drug Co., Inc., 601 F. 2d 631 (1979) (US Court of Appeals, Second Circuit, 1979), on the continued significance of the Sears-Compco doctrine.

The United States Copyright Act of 1976, 17 US CA § 301 deals specifically with the pre-emption question, abolishing state protection of rights "equivalent" to those "within the general scope of copyright" while permitting state protection of rights which are "not equivalent".

For further reading, see Melville B. Nimmer, Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works (2nd. ed., 1979); Nimmer on Copyright (1978); Brown, "Goldstein v. California: A New Outlook for the Misappropriation Doctrine" (1973), 8 University of San Francisco Law Review 199; Note, "The Copying-Misappropriation Distinction: A False Step in the Development of the Sears-Compco Pre-Emption Doctrine" (1971), 71 Columbia Law Review 1444.

8. Does the placing of a restriction on the use of property constitute a taking of property?

The question has arisen in a number of American cases in which, for example, owners of land have asserted that the enactment of zoning laws or ordinances is a constitutionally forbidden taking of property without compensation. (The Fifth Amendment to the United States Constitution states:"...nor shall private property be taken for public use, without just compensation"; state constitutions contain comparable provisions.) See Goldblatt v. Hempstead, 369 US 590 (1962); Euclid v. Ambler Realty Co., 272 US 365 (1926); and Nectow v. Cambridge, 277 US 183 (1928). For a treatment of this issue under a statute proscribing such takings, see Belfast Corporation v. O.D. Cars Ltd., [1960] AC 490 (HL (NI)).

9. Does a person have a property right in his own telephone conversations? In Malone v. Metropolitan Police Commissioner [1979] 1 Ch. 344, Sir Robert Megarry V.C. answered "no":

> [The plaintiff's counsel's] first proposition rested in the first place on a right of property. To tap a person's telephone conversation without his consent, he said, was unlawful because that person had rights of property in his words as transmitted by the electrical impulses of

> the telephone system, and so the tapping constituted an interference with his property rights. An analogy that he suggested was that the important part of a letter was the words that it contained rather than the paper that it was written on. I regret to say that [counsel for the plaintiff] found it difficult to persuade me that there was any reality in this contention, and he did not struggle long. I do not see how words being transmitted by electrical impulses could themselves (as distinct from any copyright in them) fairly be said to be the subject matter of property. At all events, no argument which even began to support such a proposition was put before me [p. 357].

10. Is the right to engage in a licensed profession a property right? For American cases answering this question affirmatively see Muckleroy v. Muckleroy, 498 P. 2d 1357 (NM SC, 1972); Roberts v. State Board of Embalmers and Funeral Directors, 434 P. 2d 61 (NM SC, 1967); and Prouty v. Heron, 255 P. 2d 755 (Col. SC, 1953). For a contrary view see Government of Malaysia v. Selangor Pilot Association, [1978] AC 337 (PC).

11. On the question of property rights in trade secrets, see Scharmer v. Carrollton Mfg. Co. 525 F. 2d 95 (US Court of Appeals, Sixth Circuit, 1975).

12. The defintion of "property" changes with society, as Charles A. Reich perceptively demonstrates in his landmark article, "The New Property" (1964) 73 Yale LJ 733. The article begins:

> THE institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.
>
> One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.
>
> The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth — forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess — allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

Reich goes on to consider the significance of the development of this new form of property, in particular with reference to individual freedom.

For another discussion of the nature of property, equally celebrated but more widely focused, see Felix S. Cohen, "Dialogue on Private Property", (1954) 9 Rutgers L. Rev. 357.

Section 3 Property as a Concept of Law

Questions of the definition of property often arise in the context of the interpretation of statutes which use the term. To what extent does the statutory context determine whether a certain interest is property? To what extent does a conclusion that something is property within the meaning of a particular statute indicate that it is, in a general sense, property?

BROWN v. R. IN RIGHT OF BRITISH COLUMBIA

(1980) 107 DLR (3d) 705 (BCCA)

The judgment of the Court was delivered by

BULL, J.A.:—This appeal is from a judgment dismissing an action brought by the appellant Lillian Brown against the respondents for a declaration, with consequential relief, that social services tax purportedly imposed and collected under the *Social Services Tax Act*, R.S.B.C. 1960, c. 361, as amended (the "*Tax Act*"), on the purchase price of electricity sold and delivered to her, an Indian, at her home on an Indian reserve, was unlawful. The appellant sued on her own behalf and on behalf of other Indians in like position.

The trial proceeded on an agreed statement of facts and on an agreed question posed. This disclosed, *inter alia*, that the appellant was an Indian within the definition of the *Indian Act*, R.S.C. 1970, c. I-6 (the "*Indian Act*"), and maintained a residence and lived on an Indian reserve as defined and provided for in that statute. The respondent British Columbia Hydro and Power Authority ("Hydro"), which carried on the business of generating, distributing and supplying electricity, delivered (presumably through transmission and distribution lines) electricity to the appellant at that residence on the reserve for domestic use. The specific period of delivery set out for the purposes of the trial was between October 12, 1976 and December 9, 1976. The appellant was charged for the electricity purchased and used by her and also under the provisions of the *Tax Act* for a percentage tax (for the period amounting to $4.38) on the purchase price of the electricity. The appellant paid to Hydro the purchase price and the tax imposed, and Hydro remitted the tax portion collected to the Crown in the provincial right as provided in the *Tax Act*.

The specific question posed to the trial Judge [87 D.L.R. (3d) 337, [1979] C.T.C. 7], was:

> Is Lillian Brown properly liable for $4.38, or part thereof, social services tax in respect of the electricity purchased from British Columbia Hydro and Power Authority between October 12, 1976 and December 9, 1976?

Basically, the position taken by the appellant, both in the Court below and before us, was that as an Indian she was exempt from

NOTES AND QUESTIONS

1. Why does the Court conclude that electricity is property? Does it analyze the question in the same way in which the Court in INS, supra p. 1.2.2, considers whether there is property in news?

2. In Rapistan Canada Ltd. v. Minister of National Revenue, (1975), 48 DLR (3d) 613 (FCA), aff'd on other grounds, (1976), 65 DLR (3d) 383 (SCC), the appellant taxpayer, the donee by deed of gift of Rapids-Standard Company Inc.'s "present manufacturing, engineering, production, management and sales know-how, techniques, skills and experience", argued that it could deduct a capital cost allowance based on the gift it received. Under Class 14 of Schedule 3 of the Income Tax Regulations, the allowance could be claimed for "Property that is a patent, franchise, concession or licence for a limited period in respect of property" ...; the Act defined property broadly as "property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or chose in action". The trial court upheld the minister's denial of the allowance, and, in dismissing an appeal, Jackett C.J., for the Court, said:

> ... as far as I know, under no system of law in Canada, does knowledge, skill or experience constitute "property" that can be the subject-matter of a gift, grant or assignment except to the extent, if any, that it can be a right or a part of a right in respect of which there is property of the kind classified as industrial property. Therefore, as I understand the "gift" in this case in the light of the evidence, it must be construed as a promise by the donor that the appellant will be informed and instructed by the "donor" as to how to commence and carry on a certain manufacturing operation. Clearly, it is not based on any of the industrial property rights such as patents for inventions, copyright, trade marks and industrial designs. ...
>
> As I understand the law, knowledge or ideas, as such, do not constitute property. ...
>
> To a limited extent, knowledge or ideas can be the subject of a monopoly conferred by a patent for an invention or by registration of an industrial design, and therefore, to that extent, "property" as, I suppose it may be said, techniques, skills and experience may be, in a certain sense. As such, however, and in the absence of any such statutory monopoly, in my view, "know-how, techniques, skills and experience" are not "property" and cannot, therefore, be "property" within class 14. ...

> The asset that the appellant acquired in this case was the knowledge of how to commence and carry on the particular manufacturing operation. That was, from the businessman's point of view, an "asset". It was not, however, "property".
>
> It is true that the appellant did, by the "Deed of Gift", acquire, by implication, a promise that the donor would do certain things and that that promise is a "right" that falls within the definition of the word "property". That right is not, however, the "know-how" that is the subject-matter of the claim for capital cost allowance. As appears from the passage just quoted from the appellant's memorandum, that promise could have been soon satisfied. The "know-how" would, however, continue as a capital asset of indefinite duration. (Once the "Deed of Gift" was executed, the appellant had a "right" to be informed and instructed. If there had been a breach of the obligation, the appellant would have had a "chose in action" in respect of that breach. Once the information was duly conveyed, the appellant had what it had bargained for — the "know-how"....) It is not, however, as such, "property" [p. 616-17].

Is this analysis similar to that in the principal case? Does Jackett C.J. take sufficient account of the statutory context in deciding whether "know-how" is property?

For another discussion of whether technical information may be property in an income tax context see Western Electric Co. Inc. v. Minister of National Revenue, (1969), 23 DTC 5204 (Can. Ex. Ct.), appeal dismissed, (1971), 25 DTC 5068 (SCC).

3. In the Marriage of Duff, (1977), 29 FLR 46 (Aust. Fam. Ct.), a divorce action, raised a question of the definition of "property" in the context of The Family Law Act 1975 of New South Wales. Section 79 of the statute gives the judge the discretionary power to make the "settlement of property" he thinks fit by, among other things, ordering transfers of "property" from one party to another. At trial, the judge, as part of the settlement, ordered that the matrimonial home be transferred to the wife and that the wife transfer her share (which amounted to a half interest) in the couple's "proprietary" (or private) company to her husband. On appeal, the husband argued, inter alia, that the settlement had been made on the basis of the trial court's erroneous determination that the corporate shares were "property" within the

meaning of the Act and thus were to be included in the total of assets to be divided. Considering this question, the appellate Court examined s. 79 and also s. 4 of the Act, the latter section of which states that "Property in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion", and stated in part:

> It seems unnecessary to attempt to set out a catalogue of what "property" may include in the content of s. 79. It is sufficient for the purposes of this case to say that "property" means property both real and personal and includes choses in action.
>
> The word "property" has been the subject of a very large volume of judicial interpretation. A compendious description of it is to be found in *Halsbury*, 3rd ed., vol. 3, par. 541, with multiple references to cases. It is sufficient for our purposes to refer to that definition which states: "Property is that which belongs to a person exclusive of others and can be the subject of bargain and sale. It includes goodwill, trademarks, licences to use a patent, book debts, options to purchase, life policies and the rights under a contract".
>
> Chitty J. in *Re Earnshaw-Wall* (4) said: "The expression 'property' is not a term of ancient art. The word is discussed in *Williams on Real Property* and incorporeal hereditaments are found under the title of real property. In that work there is a well-reasoned explanation of the word 'property' (17th ed., pp. 3, 4) which shews that it is used in three senses . . . 'Property' may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing" [p. 157].
>
> The word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in *Jones* v. *Skinner* (5) Langdale M.R. said: "Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have". This is a definition which commends itself to us as being descriptive of the nature of the concept of "property" to which it is intended that the *Family Law Act* 1975 should relate....
>
> We are of the view that the intention of s. 79 is to enable the court to take into account and assess all the property of the parties upon being asked by either of them to make an order altering the interests of the parties in the property [pp. 55-56].

(4) [1894] 3 Ch. 156

(5) (1835) 5 L.J. Ch. 90.

The Court concluded that the shares were property within the meaning of the Act, and accordingly dismissed the appeal.

Is the approach taken by the Court taken in Duff more like that taken in Brown or Rapistan?

4. In Warner Bros.—Seven Arts Inc. v. CESM-TV Ltd. (1971), 65 CPR 215 (Ex. Ct.), the plaintiff was a producer of television programs and the defendant was a Thompson, Manitoba cablevision company. The plaintiff entered into an agreement with two Winnipeg television stations under which the stations became licensees for the purpose of broadcasting six television programs. The defendant made video-tape recordings of these televised programs and transported the tapes from Winnipeg to Thompson. The programs were then rebroadcast by the defendant's closed circuit community antenna system. The plaintiff brought an action against the defendant for relief from infringment of copyright. The defendant, in one of its arguments, relied upon s. 2(a) of the Broadcasting Act, RSC 1970, c. B-10 which states that radio frequencies are to be regarded as public property. The defendant contended that its video-tapes did not reproduce the plaintiff's programs but, instead, only recorded the electrical impulses that were being broadcast by the television stations. The defendant argued that, as soon as the programs were converted into television signals, any copyright in them lapsed. In rejecting the defendant's contentions, Cattanach J. stated that while s. 2(a) of the Broadcasting Act says that radio frequencies used by broadcasting undertakings are public property, the section does not go on to say that what is sent out on those radio carrier frequencies is also public property. Cattanch J. also held that, by virtue of s. 2(c) of the Broadcasting Act, the Broadcasting Act was to be read subject to generally applicable statutes and regulations. He stated further that the Copyright Act, RSC 1970, c. C-30 was such a statute of general application. In the result, the plaintiff's claim was upheld.

Reread the summary of Canadian Admiral Corporation Ltd. v. Rediffusion Inc. (p.1.2.12), a case which raised issues similar to Warner Bros.—Seven Arts. Are the two cases consistent?

NOTES AND QUESTIONS

1. Is the reasoning in MacEwen persuasive? Does it necessarily follow, as the Court appears to believe, that if under the Prohibition Act no one may have property rights in the liquor, it cannot be stolen? Can "property" in an object exist in one sense and not another?

2. In People v. Wisch 296 NYS 2d 882 (SC, Trial Term, NY Co., 1969), the defendant demurred to charges that he was guilty of extortion and attempted extortion under what is now the Penal Law 1965, §§ 135.60, 135.65, and conspiracy to fix milk prices under the General Business Law, §§ 340, 341. It was alleged that Wisch had threatened to cut off supplies of milk to a number of small milk dealers unless the dealers agreed to standardize prices. The defendant argued that he could be found guilty of neither extortion nor attempted extortion under the Penal Law because only tangible property could be made the subject matter of a threat. The Court disagreed. It held that the term "property", as contained in the Act, had a far broader meaning than that contended by the defendant and that intangible property, such as a valuable milk route, could be the subject of an extortion.

Is the approach of the Court in Wisch consistent with that taken in the principal case?

3. Read the notes in Chapter 2 on United States v. McClain and United States v. Long Cove Seafood, Inc. (pp. 2.2.6). Are these cases consistent with MacEwen?

another person whose use of it he is powerless to regulate. Under the guise of conducting kidney-function tests, researchers collected urine from young psychiatric patients for the undisclosed purpose of testing it for secret drug abuse.[217] It was later claimed that the incident 'did not materially affect the patients in any adverse way,' and had potentially aided their treatment,[218] but the practice might create records liable to subpoena for a prosecution, and to inspection at the discretion of the treating facility. . . .

Recognizing waste materials as *res nullius*, capable of exclusive legal control by the person first possessing them, clearly will not serve the interests of the human source. Similarly, recognition as *res nullius* of material such as a limb or digit severed from the human source in an accident or an assault may be inconsistent with his interest in its preservation for prompt surgical rejoining to his body. His claim to it should not be impaired by the chance of the item falling upon another's land or being retrieved and retained by a stranger not implicated in causing the loss. A better approach, therefore, may be to consider the human source as having an inchoate right of property in materials issuing from his body, which right he may expressly or by implication abandon to another,[225] or similarly make prevail over a contending claim.

This may well accord to the sentimental reaction to the origination of body material in its separate state. The right is better considered inchoate than fully constituted, since the material may never in fact come under the source's notional or physical control. He may be unconscious, for instance, when it is separated, and it may be deemed abandoned, perhaps to a hospital, very soon after it is first isolated. Traditional jurisprudential tests of, for instance, intention, possession, and control as affecting ownership may more easily be preserved by considering the initial interest of the source *prima facie* a superior right to that of any other person,[226] but a right only in prospect. . . .

PROBLEMS

1. In June, 1976, John's arm was badly injured in an industrial accident. John was rushed to hospital. The doctors advised John that his arm should be amputated. John consented to this operation. Upon John's discharge from hospital he requested the delivery of this arm. The hospital authorities refused to return to John the amputated arm, saying that they wished to retain it for purposes of medical research. Advise John.

2. In July, 1978, Janet underwent an abortion in a downtown Toronto hospital. After a short period of recovery, Janet told her physician that she wished to take possession of the fetus. The physician refused and informed Janet that the fetus would be used for medical research. Advise Janet.

See in connection with these problems: Brooks v. South Broward Hospital District 325 So. 2d 479 (1976, District Court of Appeal of Florida), certiorari denied 341 So. 2d 290 (1976, Florida Supreme Court) (loss of body of baby who died one day after premature birth);
Browning v. Norton-Children's Hospital 504 SW 2d 713 (1974, Court of Appeals of Kentucky) (disposal of amputated leg);
Venner v. State 354 A. 2d 483 (1976, Court of Special Appeals of Maryland) (use of excrement as evidence in drug prosecution).